

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

**J. CHRISTOPHER CARNOVALE**

:

**Petitioner**

:

75/499,277

**v.**

:

**Cancellation No. 92044624**

**THE BRAND EXPERIENCE LLC**

:

**Registrant**

:

**PETITIONER'S MOTION FOR JUDGMENT  
AND FOR POSTPONMENT OF TESTIMONY OPENING**

On September 15, 2010, the Board granted Petitioner's motion to compel and ordered Registrant to answer Petitioner's second set of interrogatories and request for production within thirty (30) days. Registrant has failed to respond within the time ordered. Accordingly, Petitioner is entitled to default judgment.

Instead of responding to the outstanding discovery requests in accordance with the Board's September 15 Order, Respondent merely sent to Petitioner's counsel the email attached hereto as *Exhibit A* on October 15. In that email, Respondent claims that the attorney who had been representing it in this proceeding up until now (and since 2007) "will not be representing" it any longer." Respondent requested that all subsequent communications be directed to Respondent itself. Respondent also indicates that "[t]he Actions required to formalize this Change [of counsel] will be filed shortly." As of today, however, no such related filings have been made and there is otherwise no indication that Respondent or counsel have complied with TBMP §§ 114 and/or 116.

Although Respondent never served complete answers to Petitioner's discovery requests, as required by the Board's order compelling Respondent to serve answers, Respondent



summarily states that it “has already complied with and provided all information” . . . requested by Petitioner.” Respondent does not even attempt to explain that position, let alone prove that it is correct. Respondent also claims that it “does not understand what additional information is being requested.” Respondent’s response is inadequate for multiple reasons, including the following:

- It raises objections to the discovery requests at issue that are long overdue (and which Respondent waived long ago) – e.g., that the discovery requests are vague or already have been satisfied;
- It directly contravenes the September 15 Order, which compels Respondent to produce responsive information and documents without objection;
- It is inconsistent with repeated prior correspondence from Respondent’s counsel (or prior counsel) indicating that Respondent was preparing responses to the outstanding discovery, none of which (i) raised questions about what information and documents are being sought or (ii) stated the position that Respondent has already complied. (*See* documents attached hereto as ***Exhibit B.***)

For these reasons, the Board should find that Respondent has willfully violated the Board’s September 15 order and enter judgment for Petitioner as a result.

Petitioner further requests that the opening of testimony periods and all other dates in this proceeding be extended pending a decision on the motion for judgment.

J. CHRISTOPHER CARNOVALE

By:



Michael A. Grow  
Alec P. Rosenberg  
Arent Fox LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5339  
Telephone: (202) 857-6000

November 2, 2010

Attorneys for Petitioner

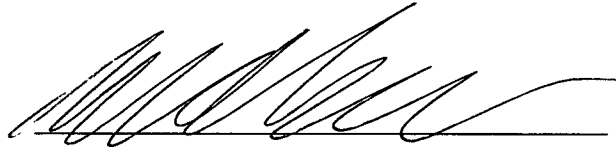
#### **CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing is being served upon Registrant's counsel Wayne Harper of Greenberg Traurig PA at Suite 650, 450 S. Orange Avenue, Orlando, Florida 32801; and Mark Schmidt of Registrant at 1521 Alton Road, #8, Miami Beach, Florida 33139 by first class mail, postage prepaid, on November 2, 2010.



## CERTIFICATE OF MAILING

It is hereby that the attached Motion for Judgment and Postponment of Testimony Opening (re Canc. No. 92044624) is being deposited with the U.S. Postal on November 2, 2010, addressed to the Hon. Commissioner of Trademarks, P.O. Box 1451, Washington, DC 22313, marked first class mail, postage prepaid.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

# **EXHIBIT A**

**Henry, Eileen**

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**Subject:** FW: Canc. No. 92044624; Notice of Change of Representation and Petitioner's Second Set of Interrogatories

---

**From:** Mark Schmidt [mailto:mark@sunsafe.com]

**Sent:** Friday, October 15, 2010 4:00 PM

**To:** Grow, Michael A.; Rosenberg, Alec

**Cc:** Henry, Eileen; Ziring, Julie

**Subject:** Canc. No. 92044624; Notice of Change of Representation and Petitioner's Second Set of Interrogatories

Re: J. Christopher Carnovale (petitioner)

Vs

The Brand Experience LLC (Registrant)

Canc. No. 92044624

Re: Notice of Change of Representation and Petitioner's Second Set of Interrogatories

This email seeks to address the following:

- 1) Notice of Change of Representation of Registrant, and
- 2) Petitioner's Second Set of Interrogatories

1) Notice of Change of Representation of Registrant

Please note that, henceforth, Wayne Harper will not be representing the Registrant in this Case.

For the purpose of having this case continue to proceed according to The Schedule defined by The Court Order, all communication shall be addressed directly to Mark Schmidt at The Brand Experience LLC.

The Actions required to formalize this Change will be filed shortly.

2) Petitioner's Second Set of Interrogatories

The Brand Experience LLC has already complied with and provided all information in answering "Questions of Fact" that have been requested by the Petitioner.

The Brand Experience LLC does not understand what additional information is being requested.

To the extent that you believe we have not answered your questions, we request that you let us know specifically what information you require.

The valid electronic signature below certifies this formal response, in writing and under oath, by The Brand Experience LLC, represented by Mark Schmidt, to the request for additional information made by the Petitioner.

/mark schmidt/

Mark Schmidt

Managing Partner

The Brand Experience LLC

It is hereby further certified, by valid electronic signature, that a written copy of this response is being served upon Arent Fox' Offices in Washington DC.

/mark schmidt/

## **EXHIBIT B**



**Henry, Eileen**

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**From:** Rosenberg, Alec  
**Sent:** Monday, November 01, 2010 4:34 PM  
**To:** Rosenberg, Alec  
**Subject:** FW: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

**Alec P. Rosenberg**  
Attorney

Arent Fox LLP | Attorneys at Law  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5339  
202.715.8552 DIRECT | 202.857.6395 FAX  
[rosenberg.alec@arentfox.com](mailto:rosenberg.alec@arentfox.com) | [www.arentfox.com](http://www.arentfox.com)

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**From:** HarperW@gtlaw.com [mailto:HarperW@gtlaw.com]  
**Sent:** Tuesday, June 29, 2010 10:31 AM  
**To:** HarperW@gtlaw.com; Rosenberg, Alec  
**Subject:** RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Alec,

Sunsafe has informed me that a significant amount of data relating to the information you requested is unavailable pending repair of a computer system. It is possible this data will be available today. I will keep you posted, and will maintain steady pressure on Sunsaf to produce the information as soon as possible.

I would like to speak briefly with you by phone this afternoon. Are you available, and if so, when will be a good time to call?

---

**From:** Harper, Wayne (Assoc-Orl-IP/Tech)  
**Sent:** Monday, June 28, 2010 4:25 PM  
**To:** Rosenberg, Alec  
**Subject:** RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Alec,

I am going into in conference with Sunsaf to go over responses to your requests. I wanted to let you know since its getting close to the end of the normal business day. I will keep you updated.

Wayne Harper

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**From:** Harper, Wayne (Assoc-Orl-IP/Tech)  
**Sent:** Wednesday, June 23, 2010 5:09 PM  
**To:** 'Rosenberg, Alec'  
**Cc:** Grow, Michael A.; Henry, Eileen; Ziring, Julie  
**Subject:** RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Regarding your fax:

We will provide responses to your discovery requests no later than June 28, 2010. I apologize for the delay.

As to the settlement agreement, the Brand Experience is not willing to enter into a settlement agreement that requires the Brand Experience to assist Carnovale to register its alleged marks.

As I have suggested in the past, the parties may wish to consider mediation. While your proposed settlement agreement has merit, a major roadblock to settlement is that my client is still angry about the fact so little effort was taken to provide him notice of the original cancellation proceeding. Please bear in mind that this is my client's perspective, and not necessarily mine.

Thus, I suggest mediation, or at least telephonic settlement conference, so my client can express his frustration and then the parties can perhaps discuss in detail how their respective brands can co-exist in the market.

In any event, I will honor the above date as to discovery and will work with you to resolve any further issues.

---

**From:** Rosenberg, Alec [mailto:rosenberg.alec@arentfox.com]  
**Sent:** Friday, May 07, 2010 5:42 PM  
**To:** Harper, Wayne (Assoc-Orl-IP/Tech)  
**Cc:** Grow, Michael A.; Henry, Eileen; Ziring, Julie  
**Subject:** RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Dear Wayne:

Please find attached courtesy copies of the discovery requests we served today by first class mail.

You never provided the "detailed status" that you committed to provide in early January (see below). On January 25, you left me a voicemail indicating that your client had been "hard to reach" but was nearing a final decision on whether to settle this matter. You advised that you would send us a final answer by January 28, but that did not happen.

This matter has been pending for far too long. Indeed, you indicated that your client was prepared to resolve the matter in accordance with the quite reasonable proposal we sent (at the end of July 2009) if our client could provide certain evidence of priority and use, which we then provided in November 2009. Please let us know whether or not your client intends to settle this matter, as the time for submitting evidence is now upon us.

We look forward to hearing from you.

Regards,  
Alec

**Alec P. Rosenberg**  
Attorney

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**From:** Rosenberg, Alec  
**Sent:** Wednesday, January 20, 2010 10:30 AM  
**To:** 'HarperW@gtlaw.com'  
**Cc:** Grow, Michael A.; Henry, Eileen; Ziring, Julie  
**Subject:** RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Wayne:

It has been two weeks since your email below. Please let us know when we can expect an update.

Regards,  
Alec

**Alec P. Rosenberg**  
Attorney

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**From:** HarperW@gtlaw.com [mailto:HarperW@gtlaw.com]  
**Sent:** Wednesday, January 06, 2010 12:41 PM  
**To:** Rosenberg, Alec  
**Cc:** Grow, Michael A.; Henry, Eileen; Ziring, Julie  
**Subject:** RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Hi Alec,

I will provide you with a detailed status by the end of the week.

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review, dissemination, distribution or duplication of this communication is strictly prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. To reply to our email administrator directly, please send an email to [postmaster@gtlaw.com](mailto:postmaster@gtlaw.com).

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**From:** Rosenberg, Alec [<mailto:rosenberg.alec@arentfox.com>]  
**Sent:** Wednesday, January 06, 2010 11:50 AM  
**To:** Harper, Wayne (Assoc-Orl-IP/Tech)  
**Cc:** Grow, Michael A.; Henry, Eileen; Ziring, Julie  
**Subject:** Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

**CONFIDENTIAL -- FOR SETTLEMENT PURPOSES ONLY**

Dear Wayne:

Further to our letter dated November 3 (copy attached) and email of December 2, 2009 (below), please let us know when we can expect to hear back from you concerning this matter. The current suspension in the above referenced proceeding expires on February 6. We look forward to resolving the parties' dispute before then.

Regards,  
Alec

**Alec P. Rosenberg**  
Attorney

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**From:** Rosenberg, Alec  
**Sent:** Wednesday, December 02, 2009 9:35 AM  
**To:** 'HarperW@gtlaw.com'  
**Cc:** Grow, Michael A.; Henry, Eileen; Ziring, Julie  
**Subject:** Carnovale / The Brand Experience

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Dear Wayne:

I am writing to follow up on my letter to you dated November 3, 2009 (copy attached), with which we enclosed documents you had requested. Please let us know whether you have had a chance to review the documents with your client and where things stand on your end with respect to settlement. Please also let us know if you have questions about the documents or otherwise wish to discuss this matter.

Thanks,  
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**Henry, Eileen**

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**Subject:** RE: Carnovale / The Brand Experience (TTAB Cancellation No. 92044624)

Alex,

I will provide responses promptly.

---

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